No. 2570

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation; CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a corporation; J. E. WOODS, and M. I. CHAPPELL,

Plaintiffs in Error,

v.

DAVID CLEMENT, as Administrator of the Estate of DAVID CLEMENT, Jr., Deceased,

Defendant in Error.

Brief of Plaintiffs' in Error

Upon Writ of Error to the United States District Court of the District of Montana

GEORGE F. SHELTON,
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A. J. VERHEYEN,
Counsel for Plaintiffs in Error.

BUTTE MINER CO., PRINTERS

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STATEMENT OF THE CASE.

A.—THE PLEADINGS.

David Clement, Jr., was killed while driving a loaded and closed milk wagon, with a glass front and side door, northward on Montana street in the City of Butte, by a

collision with a Chicago, Milwaukee & Puget Sound Railway Company train. David Clement thereafter was duly and regularly appointed and qualified as administrator of his estate, and brought this suit on behalf of the said estate.

The gravamen of the complaint is contained in paragraph VI. thereof. (Tr., p. 4 line 11 *et seq.*)

It is admitted that on the morning of the 5th of November, 1912, at about four o'clock, David Clement, Jr., was driving a pair of horses attached to an enclosed milk wagon, going northerly on Montana Street, a public thoroughfare in Butte, toward and near the Milwaukee crossing; that Woods was engineer, and Chappell was foreman of the switching crew; that the gates were not lowered at that crossing; and that David Clement, Jr., at that time and place, was killed in a collision. (Tr., p. 14, paragraph III.)

The other allegations of this paragraph (VI.), which, being denied, join issue, are substantially to the effect that David Clement, Jr., was not observant of the approach of this train from the east; that he was directly within the way of the approaching train; that the said Woods and the said Chappell did see, or by the exercise of ordinary care could have seen, him coming directly in the path of the engine; and that they did see, or by the exercise of reasonable care could have seen, that the said David Clement, Jr., was in danger of being struck by the engine, and that he was unobservant of the approach of the engine; and that, after so seeing him in danger, they negligently and carelessly drove their engine against the vehicle in which he was, without giving him warning or lowering the

gates; and that, by reason of the negligent management and operation of the engine, the Clement boy was crushed, maimed and killed.

Subsequent to the 5th of November, 1912, and prior to the commencement of the suit, the Puget Sound Company transferred by deed all of its property in Montana and elsewhere to the St. Paul Company; and the latter company assumed all of the obligations and liabilities of the former. Service was not had upon the Puget Sound Company; and that company made no appearance. The other defendants appeared separately by general demurrer. (Tr., pages 8-12.) These demurrers were, by the consent of counsel, overruled; and thereafter the defendants answered jointly. The answer is, in form, a general denial of all the alleged negligent acts of the defendants, and each of them.

The cause was tried before the court and a jury; and, after the submission of evidence, arguments by counsel, and the charge of the court, the jury retired, to bring in a verdict against plaintiff's in error in the sum of $7,500. (Tr., p. 16.)

Judgment was entered upon this verdict on May 28, 1914 (Tr., pages 17-18). A petition for new trial was duly filed on the 19th of June, 1914 (Tr., pages 19-21). This motion for new trial was denied in the memorandum opinion and order of the court handed down on the 5th day of December, 1914 (Tr., pages 22-25, incl.). A bill of exceptions having been duly signed, settled, and allowed (Tr., p. 26 *et seq.*), an assignment of errors (Tr., p. 156) and petition for writ of error (Tr., p. 166) having been duly filed, and

an order allowing said writ of error to issue having been duly given and made (Tr., p. 168), thereafter and in due time, and in the manner prescribed by law and the rules of this Honorable Court, this appeal has been perfected; and the writ of error brings the judgment of the United States District Court for the District of Montana entered upon the jury's verdict in favor of the plaintiff and against the defendants before your Honors for review.

B—THE EVIDENCE.

Much of the evidence introduced on behalf of the parties is in harmony. It is agreed that on the morning of the fatality Engineer Woods was moving a train of twelve cars loaded with coal and coke, of a total weight of about seven hundred and fifty tons, to the B., A. & P. Ry. transfer; that his train was being drawn by an engine so constructed that it could move with equal facility either forward or backward, and that there was a coal oil lamp at each end. This morning the engine was backing, drawing the train to the west, and Chappell was standing on the footboard on the south side of the engine, at the extreme west end; that some four or five hundred feet east of the crossing, the train came around a curve at a speed of about eight miles per hour. Shortly thereafter some breaking power was applied, and the speed of the train somewhat checked. Chappell says he observed the milk wagon approaching the track when he was about three hundred and thirty or three hundred and forty feet east from the crossing. The milk wagon was then one hundred and forty or one hundred and forty-five feet south of the crossing. The team and the

wagon were then going at the rate of four or five miles per hour. He watched the wagon until the train was perhaps two hundred feet from the crossing, and then gave a "slow" signal. He jumped from the train just as the horses' heads were coming on the track over the south rail. The train was then going about six miles per hour. (Tr., pages 49-50.) The lines on the horses' backs were slack when he got into a place where he could see them. (Tr., p. 55, line 6.) He watched continuously the approach of the team from the time he first saw it; and no effort was made on the part of the driver of the team to check or stop from the time he first saw it. There was no evidence of fright of the team whatever. The team gave no evidence of alarm. Its approach was uniform. He saw no driver or indication of any driver on the wagon. (Tr., p. 61, line 26, to p. 62, line 10.) Again, he says (Tr., p. 62, line 18), "The lines were slack, and there was no evidence of the driver." He stayed on the footboard until the horses' heads were on the south rail, and then, to save himself, got off. The accident happened almost immediately afterward. (Tr., p. 64, line 25, to p. 65, line 5.)

Engineer Woods testified that he saw the rig when it was about one hundred and seventy feet south of the crossing. The team was going about five miles an hour, and showed no symptoms of nervousness. When he got up where he could see, he noticed that the lines upon the horses' backs were slack (Tr., p. 106, line 24, to Tr., p. 107, line 20.) He saw the boy at no time at all before the accident. There was no indication that there was any driver in the rig.

Of these matters, there is no contradiction. It also

stands uncontradicted in the record that the injuries suffered were most grewsome. The top of the head from the bridge of the nose was completely crushed, the left arm cut off between the elbow and the shoulder, the left leg cut off at the knee, and the right leg at the shoe top. Otherwise, there was no scratch on the body. (Tr., p. 98, lines 12 to 22.)

There is no contradiction of the further testimony that approximately seventy-five feet west of the crossing were found flesh, bones, and brains scattered on Montana Street.

No one saw David Clement, Jr., until after the accident, when he was discovered beneath the train.

Of the other issues raised by the pleadings, there is much conflict of evidence. There is a conflict respecting the giving of the signals. Generally speaking, plaintiff's witnesses testified that there was a failure to give proper signals; defendants' witnesses testified that all proper signals were given. Plaintiff's witnesses testified that, under given circumstances, after Woods made the emergency application of the brakes east of the crossing the train should have been brought to a standstill in a distance of from about fifteen to a little more than thirty feet; witnesses for the defense testified that, under the circumstances, the stop was as good as could be expected.

No one, except Chappell, testified at all that there was any evidence of life after David Clement, Jr., was discovered under the train. With respect to the testimony given by Chappell, we respectfully direct your Honors' attention to the Memorandum Opinion filed by the Hon-

orable Judge of the District Court for the District of Montana (Tr., pages 22-25). Passing on the weight to be given to Chappell's testimony, the trial judge says that that worthy was foresworn, that his testimony was calculated to meet the requirements of some authorities. His Honor says that it is a daring proposition for plaintiff's counsel to argue that the question of his credibility was for the jury; and, if the verdict depended in any degree upon the witness's testimony, a new trial ought to be and would be granted. (Tr., p. 23, line 24.) The trial court says clearly and specifically that David Clement, Jr., was dead when found. (Tr., p. 23, line 18.) There being no conflict of evidence at all on the propositions that David Clement, Jr., was dead when found; that he was never seen until after the accident, and, when seen, was dead; that from the time the milk wagon first came into sight until the time of the collision, the horses never slackened speed, the lines were not drawn tight, and no effort made to check the team —it makes no difference, according to the contentions of plaintiffs in error, at what point the alarms were sounded or where the emergency application of the brakes was made; because, irrespective of all other considerations, the plaintiff in this suit cannot prevail, because (1) there is no proof of the survival of David Clement, Jr., and (2) because the evidence makes it clear that David Clement, Jr., was guilty of concurrent negligence, which precluded recovery by his estate. In addition to these two propositions, the plaintiff's in error respectfully urge it upon the attention of this Honorable Court that the complaint fails to state a cause of action, and that reversible error occurred

in overruling objections to leading questions asked by plaintiff's counsel of his witnesses.

II.

SPECIFICATION OF ERRORS.

1. The court erred in overruling defendants' separate demurrers. (Tr., pages 8-10.)

2. The court erred in denying defendants' motion for a directed verdict made on their behalf at the conclusion of the taking of testimony. (Tr., p. 153.)

3. The court erred in entering judgment upon the verdict for the plaintiff. (Tr., p. 17.)

4. The court erred in overruling defendants' objection to the question of plaintiff's witness Willoughby, on direct examination, in the following respect:

> "Q. Did you examine the track for the purpose of ascertaining whether or not there was any blood, or anything else on the track?
>
> "MR. FURMAN. I object to this question as leading, and also suggestive.
>
> "MR. WHEELER. This is for the purpose of fixing the place, as near as he can, where the body first struck the track.
>
> "Objection overruled.
>
> "To which ruling of the Court counsel for defendants then and there took and was allowed an exception."

(Tr., p. 158.)

5. The Court erred in overruling defendants' objection to the question asked of plaintiff's witness M. I. Chappell, on direct examination, in the following respect:

"Q. What did you notice with reference to any movements of any part of the body?

"MR. FURMAN. We object to this as leading and suggestive.

"Objection overruled.

"To which ruling of the Court counsel for defendants then and there took and was allowed an exception."

(Tr., p. 161.)

6. The court erred in overruling the following objections of defendants to the questions asked of plaintiff's witness M. I. Chappell, on direct examination, in the following respects:

"Q. State whether or not you noticed any blood or anything else upon the rails of the track prior to the time you saw the body east of a point where you found the body.

"MR. FURMAN. This is objected to as leading and also suggestive.

"Objection overruled.

"To which ruling of the Court counsel for defendants asked for and allowed an exception.

(Tr., p. 161, to p. 162.)

7. The court erred in overruling the following objection of defendants to the question asked of plaintiff's witness M. I. Chappell, on direct examination, in the following respect:

"Q. Was there any blood or anything of that kind?

"MR. FURMAN. I object to this as leading and suggestive.

"Objection overruled.

"To which ruling of the Court counsel for defendants asked for and was allowed an exception.

"Q. About how far east of the body was it that you found the blood?

"MR. FURMAN. I object to this as leading and also repetition.

"Objection overruled.

"To which ruling of the Court counsel for defendants asked for and was allowed an exception.

(Tr., p. 162, to p. 163.)

8. The Court erred in overruling the defendants' objection to the question asked of plaintiff's witness M. I. Chappell, on direct examination, in the following respect:

"Q. What have you to say as to whether or not it should be rung continuously?

"MR. FURMAN. This is objected to as leading and suggestive.

"Objection overruled.

"To which ruling of the Court counsel for defendants asked for and was allowed an exception.

(Tr., p. 163.)

III.

ARGUMENT No. I.

The complaint does not state a cause of action in favor of the plaintiff and against the defendants, or any of them, under the laws of Montana or the United States.

It appears from the face of the complaint that this suit is brought on the doctrine of the last clear chance. Certainly if it be not brought on that doctrine, then the uncontradicted evidence of David Clement, Jr's. contributing negligence precludes a recovery. If the suit is brought on the doctrine of the last clear chance, the pleading in not sufficient to state a cause of action in favor of the plaintiff and against the defendants, or any one of them.

The doctrine of the last clear chance is well established in Federal law and the particular incidents that attach to a proper application of the doctrine have been repeatedly specified. We call the attention of the court to the case of *Iowa Central Railway Co. v. Walker*, 203 Fed. 685. That case is on all fours with the proposition here urged, and we quote a considerable portion of the opinion in that case:

> "'But, as I have already said to you, down to the time he was within the danger limit, in my judgment, there is nothing to be considered by you. Now, after he was within the danger limit, could he, by the exercise of diligence, have been seen by the engineer to be inside of the danger limit? Then, from that point, had this engineer exercised care and freedom from negligence, as he ought to do, could he then have averted the injury? If not, then your verdict will be in favor of the company. If he, the engineer, could have averted the injury after he saw the hazardous position in which the plaintiff had placed himself, then you will find a verdict for the plaintiff.'
>
> "This instruction was faulty, in that it submitted to the jury the question as to whether or not, in the exercise of diligence on the part of the engineer, he could have discovered that the plaintiff was inside the danger limit. The instruction in that respect was excepted to by defendant.
>
> "In Denver City Tramway Co. v. Cobb, 164 Fed. 41, 90 C. C. A. 459, Justice Van Devanter, then Judge Van Devanter, speaking with regard to the exception which permits plaintiff to recover, notwithstanding his own contributory negligence, said:
>
> "'The exception does not apply where the plaintiff's negligence or position of danger *is not discovered* by the defendant in time to avoid the injury.'
>
> "In Hart v. Northern Pac. Ry. Co., 196 Fed. 180, 116 C. C. A. 12, this court said:

"'It presupposes or concedes the existence of contributory negligence, and seeks to avoid its consequence by subsequent occurrences. If it were true that Starr was in a state of actual peril, that the defendant *had actual knowledge* of that peril, and *after* that *knowledge was acquired* failed to exercise ordinary care to prevent injuring him, these facts might create a cause of action, or might excuse the contributory negligence which brought Starr into his position of peril.'

"Numerous other authorities might be cited to the same effect, to-wit, that the defendant's liability under what is known as the last clear chance doctrine is *only where, after actual discovery* of the plaintiff's perilous position the injury could be avoided by the exercise of ordinary care and diligence."

The Supreme Court of the State of Montana has passed upon the question of the doctrine of the last clear chance, and there is no conflict between the laws of this state and this rule of the Federal courts. The case of *Dahmer v. Northern Pacific Railway Co.*, 48 Mont. 152; 136 Pac. 1059, was a case in which the Supreme Court was called upon to determine the law with relation to this doctrine. Mr. Chief Justice Brantly wrote the opinion of the court.

"It may be remarked, however, that the rule is limited in its application to those cases only in which the plaintiff, or the person injured or his property, has by his own act been exposed to injury at the hands of the defendant, and the defendant, after discovering the situation of the person or property in time, has failed to use ordinary care to avert the injury. (1 Thompson on Negligence, Sec. 228.) A case calling for its application embodies three elements, viz.: (1) The exposed condition brought about by the negligence

> of plaintiff or the person injured; (2) the actual discovery by the defendant of the perilous situation of the person or property, in time to avert injury; and (3) the failure of defendant thereafter to use ordinary care to avert the injury. All of these elements must concur, else the rule has no application, and liability must be predicated upon the failure of defendant to discharge toward the person injured or his property, some other duty imposed by law under the facts of the particular case as they are made to appear. The duty imposed by it is, not to use ordinary care to discover the peril and also to avert the threatened injury, but to avert the injury after the perilous situation is actually discovered." (And citations.)

The court discusses, further, a doubt that seems to have lurked in the minds of different lawyers with relation to the application of this doctrine, but it does not qualify or limit in any manner at all the statement hereinbefore quoted, and it says, without any qualification, that, whatever may have been in the minds of different lawyers within the State, the doctrine has no application unless all of the enumerated elements appear.

So, then, the conclusion from these considerations is that a complaint based upon the doctrine of the last clear chance fails to state a cause of action unless it is alleged that plaintiff's intestate was actually discovered in a place of peril, and there is a failure of proof unless it appears from the evidence that discovery was actually made.

The complaint in the case at bar pleads discovery alternatively. It says that David Clement, Jr., was discovered, or, by the exercise of ordinary care, could have been discovered. This is exactly the form of pleading condemned

in the cases hereinbefore cited, and falls far short of the requirements of the law of the State of Montana and of the United States.

It will be observed that there is equal failure of proof of discovery, all the evidence being that Clement, Jr., was never discovered in peril or at all until after he had expired. More will be said later with respect to the possibility of averting the accident after Clement, Jr., was discovered in a place of peril. Here we urge only that there was never a discovery at all of Clement, Jr., in a place of peril; and that it is not alleged that he was so discovered.

ARGUMENT NO. II.

It is error to permit counsel to lead his witnesses.

> "A question which suggests to the witness the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it."
>
> Revised Codes of Montana 1907, Sec. 8019.

The function of law is to protect the rights of parties. One of the provisions calculated to protect a party who has a cause pending before a jury is this section of the Revised Codes of Montana. Your Honors are too familiar with the effect upon the minds of the jury of the habit of some lawyers in testifying before a jury by means of the questions that they ask, to require appellants to waste any considerable space upon the proposition that it is most danger-

ous to permit counsel to ask, in the presence of a jury, questions which are in form forbidden by the statute.

It is a matter of the utmost materiality to litigants whether counsel for the opponent shall be permitted to suggest, by innuendo and question, thoughts to the minds of the jury that the examination of the witness on the stand would not justify. There are, undoubtedly, circumstances which justify the court, in its discretion, in permitting counsel to ask questions which lead their witness and to suggest the answer. The Code section recognizes such a contingency, and provides for it, with the very clear expression, however, that it shall not be allowed except in the sound discretion of the court, under special circumstances that make it appear that the ends of justice require it. It does not appear from any authority that we have read, and we have not heard it suggested, that the fact that a witness is not giving the answer sought by counsel is a sufficient showing that the ends of justice require the court to permit the question.

We raise no question at all about the form of introductory questions; but we do urge most respectfully, but earnestly, that it is a deprivation of a material right for opposing counsel to be permitted, in the absence of the showing provided for by the statute, during the examination in chief with respect to matters of moment and materiality, to ask questions that are vicious in their form. It is not the substance of the answer that does the damage, but the form of the question, and the suggestion, by asking it, on the part of eminent and learned lawyers, whose presence has weight with the jury, is the violation of a right preserved

to a litigant by the Code of this state. The Code does not say that leading questions may be asked about matters which in the opinion of the trial judge are not of the utmost materiality; it says that they shall not be asked at all, except under stringent and rigidly applied conditions; and it is error of a most prejudicial kind for the court to permit the infraction of this rule; and, until the legislative body of the State repeals the act we believe that litigants are entitled to the full measure of protection contemplated and provided for.

ARGUMENT NO. III.

David Clement, Jr., was guilty of concurrent negligence, which precludes any recovery in this action.

All the witnesses who testified in this case agreed that the train first came in sight of the milk wagon when it was approximately four hundred feet east of the crossing, and the wagon itself was approximately one hundred and fifty feet south of the crossing. The view was equal and wholly unobstructed. There was never the slightest effort made by anyone in the milk wagon to check the speed of the horses, which jogged along at a very uniform, steady gait, to the northward at a rate of four or five miles per hour, only slightly less than that of the train itself, until the time when Chappell jumped off the running-board, just in time to avert accident himself, at a time when the horses' heads were just upon the track of the railroad, and at a time when we believe the evidence justifies us in saying that no human agency could have averted the injury.

Human experience tells us that the team could have been stopped at any instant in a second's interval of time; and the evidence is conclusive that the negligence of David Clement, Jr., continued until the very instant of his accident, and there never was even an infinitesimal space of time after his negligence ceased prior to the happening of the accident; his negligence did not cease until the instant of the accident and his death. That being true, no recovery can be had. Authorities on this point are numerous and of great weight. We do not assume to quote more than a few of the leading cases.

Dunworth v. Grand Trunk Western Ry. Co., 127 Fed. 307, at page 310,

says:

> "There are no facts disclosed in this record calling for the application of the modification of the rule. It does not appear that the presence of the deceased upon the track was observed by the locomotive engineer, or that after seeing him, and after knowledge that he was unobservant of his danger, there was time to avoid the catastrophe. To bring the case within the modification of the rule it is incumbent upon the plaintiff to make a showing calling for its application."

Southern Ry. Co. v. Carroll, 138 Fed. 638,

is a case in which a traveler, knowing of a railroad crossing, as David Clement, Jr., knew of this crossing, approached it at night in a carriage with drawn side curtains, without looking or listening for the approach of a train which was in sight and hearing. The traveler was driving at a dog trot. He testified that he had crossed the cross-

ing several times in the day time. In such an instance, the Circuit Court of Appeals for the Fourth Circuit says that the law in the case is clear, that "the traveler is required to give way to any train which is in sight or hearing"; and the traveler who knows of the crossing must look and listen for approaching trains before even attempting to cross a track, and he must begin to look and listen at such a distance from the track as to enable him to stop in case he hears an approaching train. "If the unexplained evidence shows that the injured person could certainly have seen the train in ample time to avoid it if he looked, it is conclusively to be presumed that he did not look, or did not heed, and he is to be held negligent as a matter of law." "Nor is it an excuse that the usual or statutory signals of approaching trains were not given."

Schofield v. Chicago Ry. Co., 114 U. S. 615.

In the Carroll case the court ordered judgment for the defendant.

Illinois Central R. Co. v. Ackerman, 144 Fed. 959,

is a case very similar in its physical aspects to the one at bar. In that case, the court said that a look when the deceased was fifty feet from the point of collision would have revealed to him the approaching train at any point within four hundred feet, or thereabouts; and the legal duty imposed upon the injured man in that case was to look and listen, and "the men upon the train were not obliged under the circumstances to anticipate his negligence. They could very well have assumed either that he knew of the approach of the cars and intended to stop at the customary safe dis-

tance or that he would look when near the track and then stop before going upon it." "He was not in a place of danger until it was too late to prevent the accident. The negligence of the employees of the railroad company and that of the deceased were *concurrent* and *continuous* down to the very moment of the collision, and there is no room for the contention that the negligence of the latter should be regarded as a known condition upon which the negligence of the former subsequently operated." A directed verdict should have been granted.

C., M. & St. P. Ry. Co. v. Clarkson, 147 Fed. 397, says:

> "Suppose there had been a flagman at the crossing, what fact is there in evidence from which any jury should be allowed to infer that the life of Clarkson would have been saved? The place where such flagman would have been Funda was about with his lantern alight, in plain view of Clarkson, if then approach the crossing."

So is it here. The train was coming in plain view, without an obstruction; and if Clement, Jr., had been paying any attention at all for his own safety, he would have avoided the accident. The slightest precaution even at the last minute would have saved him; but he observed no precaution, and was negligent up to the instant of the accident.

> "In any permissible view of the facts and the law of this case, this verdict cannot stand except upon the license of a mere conjecture, as needful to be restrained as a disguised confiscation. The court should

have granted the request of the defendant for a directed verdict." (147 Fed. 408.)

We urge the same proposition about the case at bar.

St. Louis & S. F. R. R. Co. v. Summers, 173 Fed. 358,

discusses the applicability of the doctrine of the last clear chance, and says that it is well settled that, notwithstanding the contributory negligence of a traveler in crossing a railroad track, which precludes recovery for the primary negligence of the railway company in operating its train so as to bring about a collision with him, "yet another and different cause of action arises in favor of the traveler if for any reason he is exposed to imminent peril and danger, and the railroad company, after actually discovering that condition, could, by the exercise of ordinary care, have stopped its train, or otherwise have avoided injuring him, and failed to do so." (Citations.) "But in the application of this rule *care must be taken* to avoid undermining the rule of contributory negligence. Such negligence of the traveler in law fully exonerates the railroad company from the consequences of its original negligence, and some *new* and *subsequent* act of negligence must arise to create a cause of action; and this new or secondary act must be established by proof, unaided by the former acts, which have been excused by the traveler's contributory negligence."

"It may be that the engineer might have seen, and should be presumed to have seen, Magar approaching the main track; but this would constitute no evidence that his peril was appreciated. Common observation and experience teach that men engaged in hauling

freight about railroad stations frequently approach close to the tracks with their teams and stand there while trains pass near them. Engineers in charge of trains must be presumed to be familiar with this practice, and to operate their trains in the light of it. It would constitute a serious embarrassment to traffic, if engineers should be required to stop or slow up upon seeing the approach of a wagon to the tracks. They have a right to presume that the drivers will observe the precaution which the law imposes upon them as a duty, and keep off the tracks on the approach of trains."

Colorado & S. Ry. Co. v. Tucker, 173 Fed. 605,

holds that a man who walked, in the day time, upon a crossing, immediately in the way of an engine which was backing toward the crossing at a speed of five or six miles an hour, and in plain sight, with nothing to obstruct the view, is, as a matter of law, chargeable with negligence which precludes recovery for his death.

Illinois Central R. Co. v. Nelson, 173 Fed. 915,

is a case strikingly parallel to the case at bar. There, as here, substantially the only evidence of negligence was conflicting testimony with relation to the distance in which a train moving at the rate of four or five miles per hour could be and should be brought to a stop. In that case, plaintiff's witnesses testified that, under the circumstances, the train should be stopped from twelve to twenty feet. As a matter of fact, it ran more than one hundred feet. In that case, the only evidence of negligence was that after the discovery the train ran farther than the plaintiff's witnesses thought it should run. In this case, there is, to be

sure, no discovery of David Clement, Jr., in time or at all; but there is testimony on the part of plaintiff's witnesses, who, it will be observed, were all discredited, disgruntled, and discharged railway employees who either had pending at that time litigation against railroad corporations or had settled such litigation within a short while prior to the trial of the case in which they gave testimony, that, in their judgment, the train ran too far past the crossing. In the case cited, the Circuit Court of Appeals for the Eighth Circuit was of the opinion that a directed verdict should have been granted on facts substantially the same as in this case.

Horan v. B. & M. R. Co., 184 Fed. 453,

holds that, as a general proposition, an engineer is not chargeable with negligence for not stopping his train on the approach of a traveler; because, in the absence of exceptional situations, he would be justified in assuming that the traveler would see the train and would not walk in front of an approaching engine.

Northern Pacific Ry. Co. v. Tracey, 191 Fed. 15,

holds that the question of negligence is a question of law for the court when the facts are undisputed and the inferences are so clear that reasonable men ought not to differ on them. That suit was founded on a statutory duty of the company which was violated. The court says that a traveler who fails to exercise due care cannot complain of an injury received through the negligence of the railway company, where his own negligence contributed.

Northern Pacific Ry. Co. v. Alderson, 199 Fed. 735,

holds that travelers are required to use their senses of sight and hearing on approaching crossings. The propositions under discussion in this case differ from the ones in the case at bar; but recognition is made of the rule for which plaintiffs in error contend.

Iowa Central Ry. Co. v. Walker, 203 Fed. 685,

has already been quoted at considerable length on the proposition that the complaint does not state a cause of action. That case supports also the present contention.

Kaiser v. N. P. Ry. Co., 203 Fed. 933,

holds:

> "The failure to ring the bell or blow the whistle of the engine was, at most, concurring or succeeding negligence, which failed to prevent the natural consequences of plaintiff's carelessness, but was not of itself such negligence as would render defendant liable. Ordinary care required that he be alert in the use of his senses of sight and hearing to guard himself from harm, and no reliance on the exercise of care by persons in control of engines or trains can excuse his failure to exercise such care."

Coleman v. Atlantic Coast Line, 69 S. E. 251,

holds that there can be no recovery by one injured at a crossing, where his negligence proximately contributed to the injury, though the company was also negligent. Discussing the question when a traveler is bound to look, this court holds that it is his duty to look in time to save himself; and, when the traveler is careless and indifferent, he cannot complain if injured.

McNeill v. Atlantic Coast Line, 83 S. E. 704,

is a case in point on the contention that there was no lamp burning on the head of this train. There is testimony that it was burning when the engine left the roundhouse; but Willoughby testified that it was not burning at the time of the accident. The McNeill case holds that in an action for the death of a person struck by a train at night, where the evidence showed the failure of the train to carry a headlight, but the evidence of the cause of death was circumstantial, and was as consistent with decedent's coming on the track suddenly in front of the train as with any other theory, there could be no recovery as a matter of law.

It cannot be seriously argued in this case that the proximate cause of Clement, Jr.'s death was the absence of a light on the head end of the engine; because the testimony is that Chappell was on the head end of the train, and he claims stood with a lantern in his hand. The proximate cause of Clement, Jr's, accident was his negligence in driving immediately in front of an approaching train at a time when the engine men could not avoid injuring him.

Van Winkle v. N. Y. C. & St. L. Co., 73 N. E. 157,

holds that a railway track is itself a warning of danger; and cites authority supporting that proposition; and says, further, that while the burden of showing contributory negligence rests upon the defendant, if the testimony given on behalf of the plaintiff shows that condition obtains, there can be no recovery.

Smith's Admr. v. Cincinnati. N. O. & T. P. Ry. Co., 142 S. W. 1047,

holds that an engineer had the right to assume that intestate would heed the warning of the approaching train and keep out of its way. "It was not incumbent on him to stop the train until it became reasonably apparent that the intestate was oblivious of the danger." In that case, as in the one at bar, when it became manifest that plaintiff's intestate was in peril, it was too late to save him. A directed verdict was proper.

Powers v. I. C. Ry. Co., 136 N. W. 1049,

holds that "the engineer did see the plaintiff when he was eight or ten rods east of the track, it is true; but he had the right to suppose that plaintiff would exercise reasonable care and not drive on to the track ahead of the train: and, when he discovered that he did not intend to stop, it was then too late to prevent the collision." A verdict should have been directed on such a showing of facts.

Bates v. L. & N. R. Co., 64 So. 298,

says the law is too well settled to require much discussion; and that when plaintiff's testimony shows that he was guilty of contributory negligence, as a matter of law he is precluded from recovery. In that case also there was expert testimony about the distance in which a train could be stopped.

Labelle v. Central Vermont R. Co., 88 Atl. 517,

was a case in which a verdict was directed for the defendant. Plaintiff excepted on the ground that he was entitled

to go to the jury on the doctrine of the last clear chance. His contention was held to be wrong because of the fact that, while the plaintiff, who was driving gentle and well-managed horses in a safe place at a safe distance from the track, the train was within his view and could have been seen; and if he did not see it, it was because he was not looking and listening, as the law requires. Failing to exercise his faculties in this respect, going upon the crossing was negligence that precluded a recovery, unless this negligence became remote, within the doctrine of the last clear chance; and the statement of the applicability of that doctrine as it is made by the court in this instance, is a clear and concise statement of the proposition urged in this section on behalf of the plaintiffs in error.

> "Should the case have been submitted to the jury upon the doctrine of the 'last clear chance'? The negligence of the plaintiff proximately contributing to the accident continued as long as it was possible for him to avoid personal injury. He was walking between the front wheels and the body of the dump cart, his horses perfectly manageable. The space between the forward wheels and the body was sufficient for cramping purposes, and there was no evidence tending to show that it was not large enough for the plaintiff to go through and outside the wheels, thereby to leave the team at any time before he went upon the track, if need be, for his safety. He could have done this until the train was so near, according to the undisputed evidence, that it was no longer possible for those in charge to prevent a collision. Thus it appears that the plaintiff's negligence, proximate in character, was concurrent with that of the defendant (assuming that the defendant was negligent) as long as it was possible for the latter to avoid the accident. In this respect the

> case is not distinguishable from that of Flint's Admr. v. Central Vermont Ry. Co., cited above, and the doctrine of the 'last clear chance' does not apply. French v. Grand Trunk Ry. Co., 76 Vt. 441, 58 Atl. 722; Butler v. Rockland, etc., St. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; Green v. Los Angeles Terminal R. Co., 143 Cal. 41, 76 Pac. 719, 101 Am. St. Rep. 68."

Green v. L. A. T. R. Co., 76 Pac. 719,

is a case absolutely in point, was argued with great skill and ingenuity, and was carefully considered. It is hardly practicable to quote from the case at all without quoting at such great length as will unduly tax the patience of this Court; but the case holds that the doctrine of the last clear chance applies in cases where the defendant knows of the plaintiff's danger, was aware of the dangerous predicament, and fails to do something which he could do to avoid the injury; *but the doctrine has no application to a case where both parties are guilty of concurrent acts of negligence, each of which said acts contributes to the accident and the injury complained of at the very instant when the accident occurred.*

That is the exact situation in this case. At the very instant of collision and accident, the negligence of both parties was concurrent and active, if, indeed, defendant was negligent at all; and the doctrine of concurrent negligence, rejected by the trial judge in the cause at bar both on motion for a directed verdict and on motion for a new trial, is thoroughly established in law, is well grounded in reason, and controls in this case.

Rowe v. So. Cal., 87 Pac. 220,

holds that because a decedent was in no danger until he stepped on the track, and because the engineer had no notice that decedent would step upon the track, the latter's contributory negligence defeated the cause of action, and the doctrine of the last clear chance did not apply, because when it was reasonable for him to think that there was danger, it was too late to avoid the accident. "Trains are not ordinarily stopped or even held stationary to allow people on foot to pass in front of them"; and we submit that a milk wagon is in no better position on this proposition than a pedestrian. And the court holds that contributory negligence is a proper question for the court in cases of this kind.

Coleman v. A. T. & S. F. Co., 123 Pac. 756, says:

that the plaintiff and his driver were negligent in failing to look for an approaching train that they could have seen in time to stop and avoid the collision; that the conductor could have seen and stopped his train, had he been vigilant, and so he was negligent; and the collision was the immediate result of the concurring negligence of both parties. That being true, defendant should have judgment, and it was so ordered.

Dyreson v. U. P., 87 Pac. 680,

hold that there can be no recovery for an injury to a plaintiff caused by negligence of the defendant if the plaintiff could have avoided the accident by the exercise of ordinary care on his own part, although the defendant should

have discovered plaintiff's peril in time to have prevented the accident, provided plaintiff's negligence continued up to the instant of his injury, and where, with reasonable diligence before that time, he could have learned of his danger and escaped its consequences; that is to say, the doctrine of concurrent negligence is plainly affirmed and expressed by the Supreme Court of Kansas in this case, which appears in

7 L. R. A. (N. S.), at page 132.

The note to this case should be quoted substantially as it appears, because it is a clear exposition of the doctrine of concurrent negligence, relied upon by the plaintiffs in error, provided the court deem the pleadings sufficient to bring the case under the doctrine of the last clear chance. If that doctrine be not sufficiently pleaded, there can be no contention that the doctrine of contributory negligence does not immediately preclude defendant in error from recovery.

Drown v. N. O. T. Co., 10 L. R. A. (N. S.) 421,

is a strong case supporting our contention that the doctrine of concurrent negligence and evidence of continuing negligence on the part of an injured person till the very moment of his accident controls the case at bar and defeats recovery. There, as here, the driver of plaintiff's team drove toward the track until he collided with a car. He could see for a distance of two hundred or two hundred and fifty feet; but, without doing anything to avoid injury, he risked his life and the principal's property, on the presumption

that defendant's servants would make no mistake. That is not quite the situation here, but substantially so. In that case, the court impressed upon the jury the doctrine of the last clear chance. There is a very long and learned discussion of the applicability of the doctrine; but the gist of the opinion is contained in the following words:

> "Assuming that the defendant was negligent in not seeing the buggy on the track and in not avoiding the accident, yet the plaintiff's negligence was continuous and was concurrent at the very moment of the collision. It proximately contributed to the collision, for without it the collision would not have occurred. There was no new act of negligence by the defendant, which was independent of the concurrent negligence, and which made the latter remote. *Therefore, there was no place in the case for the doctrine of the 'last clear chance.'* "

And that doctrine does not apply, nor does it in the case at bar. This is very eminent authority, on all fours with the present case.

Southern Ry. Co. v. Bailey, 67 S. E. 365,

denies the applicability of the doctrine of the last clear chance, on the ground that plaintiff's negligence continued till the very instant of accident, and was therefore contemporaneous and concurrent with the negligence of the defendant, if defendant was negligent at all, there being no showing at all of wantonness or willfulness. The case quotes with approval from

Consumers Brewing Co. v. Doyle, 46 S. E. 390,

which holds that if the continuing negligence of a plaintiff

up to the time of the injury concurs with the negligence of the defendant in causing the injury, plaintiff cannot recover; also from

Robards v. Indianapolis St. R. Co., 66 N. E. 66, 67 N. E. 593,

the language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous; also from

Green v. L. A. R. Co., 76 Pac. 719,

that it (the doctrine of last clear chance) "has no application, however, to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it."

O'Brien v. McGlinchy, 68 Me. 552,

says that the doctrine of last clear chance does not govern where both parties are contemporaneously and actively in fault, and, by their mutual carelessness, an injury ensues to one or both.

Wabash Ry Co. v. T. L. & T. Co., 98 N. E. 64,

rests on the ground that the negligence of the plaintiff was continuous and concurred with that of the defendant until the very instant of the accident; and that fact is fatal to the application of the doctrine of the last clear chance so as to support a recovery, where the plaintiff's danger was not actually discovered until it was too late to avoid injury and defendant's negligence consisted in keeping an incompetent watchman at a crossing and in running a train at a

rate in excess of that allowed by the City Ordinance. This case holds that the doctrine of the last clear chance cannot be applied, because decedent had the power down to the last instant to avoid the injury. It quotes with approval

> Evans v. Adams Express Co., 122 Ind. 362, 367; 23 N. E. 1039, 1041,

where the following language was used:

> "Where the negligence of two persons is contemporaneous, and the fault of each operated directly to cause the injury, the rule deducible from the authorities is that the plaintiff cannot recover, if by the exercise of ordinary care on his part he might have avoided the injurious results of defendant's negligence. Chicago, etc., R. Co. v. Hedges, 118 Ind. 5, 20 N. E. 530; Lake Shore, etc., R. Co. v. Brown (1908), 41 Ind. App. 435, 84 N. E. 25, and cases cited; Indianapolis, etc., R. Co. v. O'Donnell, 35 Ind. App. 312, 73 N. E. 163; Hammers v. Colo. & South. R. Co. (1911), 128 La. 648, 55 So. 4, 34 L. R. A. (N. S.) 685; 3 Elliott, Railroads, Sec. 1175; Dyerson v. Union, etc., R. Co., 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, and note, 11 Ann. Cas. 207; Himmelwright v. Baker, 82 Kan. 569, 109 Pac. 178; Elliott v. New York, etc., R. Co., 83 Conn. 320, 76 Atl. 298; Bourrett v. Chicago, etc., R. Co. (Iowa), 121 N. W. 380; 66 Cent. Law J., 215; Sherman & Redfield on Neg. (5th ed.), Sec. 99; Drown v. Northern, etc., Co., 76 Ohio St. 234, 81 N. E. 326, 10 L. R. A. (N. S.) 421, 118 Am. St. Rep. 844; Rider v. Syracuse, etc., R. Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; Gahagan v. Boston, etc., R. Co., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; Green v. Los Angeles, etc., R. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68; Burns v. Louisville, etc., R. Co., 136 Ala. 522, 33 So. 891; O'Brien v. McGlinchy, 68 Me. 552; Franklin v. Engle, 34 Wash. 480, 76 Pac. 84."

An investigation of practically all the cases in which the doctrine of the last clear chance is sought to be applied, shows that the true view of the law and the one best supported by carefully reasoned cases is that the doctrine may apply, despite the fact that the defendant's negligence was no more than a failure to perform its duty in discovering danger; but, in every such case, it is an indispensable condition that before the doctrine can be applied, the evidence must conclusively show that plaintiff's negligence has wholly terminated and culminated while it was still possible for the defendant to avoid the consequences of collision; and, if the negligence of the plaintiff continued till the very instant of the accident, it comprises concurrent negligence, and the doctrine of the last clear chance is never permitted to prevail.

In Montana and in the Federal Court, discovery is a prerequisite; and, on the view most favorable to the defendant in error, there is no conflict of law on the proposition that the evidence introduced on behalf of plaintiff precludes his right of recovery.

Railroad Co. v. Houston, 95 U. S. 697,

says that the neglect of train men to give proper signals approaching a crossing does not relieve a traveler of the necessity of looking out for himself. Before attempting to cross, the traveler is bound to use his senses to look and listen, in order to avoid accident. If he omits to use his senses and walks thoughtlessly on the track; or, if after using them, takes a chance on crossing the track, and is injured—in either instance, he is deprived of any right to

complain, and must suffer the consequences of his own temerity.

Schofield v. C., M. & St. P. Ry. Co., 114 U. S. 615,

holds in conformity with the doctrine of the *Houston* case, cited. The case holds that a verdict should be directed for the defendant in a case where a person in a sleigh drawn by one horse, traveling a road with which he was familiar, near a railroad crossing which he knew, could have seen a coming train if he had looked. He did not look, and was hurt; and, despite the fact that the train was an irregular one and running at a high rate of speed, and did not whistle or ring a bell, his contributory negligence precludes recovery.

Northern Pacific Ry. Co. v. Freeman, 174 U. S. 379,

was appealed from the Circuit Court for the District of Washington to the Circuit Court of Appeals for the Ninth Circuit; thence to the Supreme Court, where a judgment on a verdict for plaintiff was reversed, and the cause remanded to the Circuit Court of Washington for a new trial. This case holds that the duty of a person approaching a railway crossing, whether driving or on foot, to look and listen, is so elementary and has been affirmed so many times that a mere reference to the *Houston* and *Schofield* cases, *supra*, is sufficient illustration of the general rule. There were three witnesses to the accident. They were two hundred or two hundred and fifty feet away. Freeman drove his horses at a slow trot, at a uniform rate of speed, right up to the time of the accident; that he looked straight before him, without turning his head either way; that the

team did not swerve, but trotted directly on to the crossing, and that the deceased made no motion to stop until just as the engine struck him. Freeman was a young man, eyesight and hearing good, knew the crossing, and at a distance of forty feet from the railway track could have seen the train approach for a distance of three hundred feet. The court quotes the *Houston* case, *supra*, with approval, and says that failure to whistle or ring the bell was no excuse for plaintiff's negligence. "She was bound to look and listen before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others." The court says, further, that the facts are that the deceased, Freeman, approached a well known crossing, with the train in full view. If he had used his senses, he could not fail to see it. Notwithstanding that fact, the accident occurred.

> "Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or, if he looked, he did not heed the warning."

Under such circumstances, which are on all fours with the case at bar, the Supreme Court of the United States was of the opinion that the defendant was entitled to a

directed verdict. Such, we contend, is the right of the plaintiffs in error in this case.

ARGUMENT NO. IV.

There is no evidence that David Clement, Jr., survived the accident, and the motion for a directed verdict should have been granted; and it was error to enter judgment on the verdict.

Plaintiff below must prove the essential averments of his complaint by a fair preponderance of the evidence, or his cause fails. This is admitted to be the law.

Corcoran, Admx., v. B. & A. Ry. Co., 133 Mass. 507,

at page 509, holds that the burden of proof is on the plaintiff to show that her intestate survived. The question being left to conjecture, the evidence would not justify the jury in finding that the plaintiff had sustained this burden of proof; and a directed verdict for the defendant is right.

The case of

Melzner v. N. P. Ry. Co., 127 Pac. 146,

on page 148, clearly recognizes the burden upon the plaintiff below to show that his intestate survived his injuries for an appreciable length of time. We do not understand that counsel for defendant in error make any contention adverse, but contend only that the jury were entitled from the evidence to conclude that there was a survival. Plaintiffs in error contend that there is no evidence justifying such a conclusion, and that the failure to introduce such evidence was fatal to the contention of defendants in error.

Respecting the evidence in this case, the same thing must be said here as was said in the case of

> Railroad Co. v. Pendergrass, 69 Miss. 425, at page 434:
>
> "On the few horrible facts in evidence as to the death of the deceased, we cannot consent that the evidence shows that he survived the injury. He was run over by a swiftly moving train, under circumstances undisclosed, and was ground to pieces, and the fragments strewn along the track, and near it, for seventy or eighty feet. To say the jury was warranted in holding that he survived the injury for any appreciable space of time, however short—that his death was not instantaneous—is impossible."

That is the condition of the evidence here. There is absolutely no testimony standing in this record respecting any survival of Clement, Jr. The only man who testified in that regard is Chappell, and his testimony was rejected by the trial judge, who states in his memorandum opinion (Tr., pages 22-25), that if the verdict depended in any degree upon Chappell's testimony, a new trial ought to be and would be granted. The trial judge said that when found deceased was dead. (Tr., p. 23, line 18.)

The survival statute of Montana presupposes a cause of action in favor of the deceased. It does not create a new cause of action; merely preserves to the heirs or representatives of the deceased the right to sue, which deceased had during his life time. This proposition is settled in the case of

> Dillon et al. v. Great Northern Ry. Co., 38 Mont. 485; 100 Pac. 960.

In that case, the court decided, upon the agreed statement of fact that Dillon was instantaneously killed, that no cause of action survived to his estate, reasoning that in his life time plaintiff's intestate had no cause of action. The Supreme Court of Montana, speaking by Mr. Justice Holloway, quotes with approval (100 Pac., 965) from a Massachusetts case in the following language:

> "The cause of action must accrue during the life time of the party injured. Here there was no time during the life of the intestate at which a cause of action could accrue, because the life closed with the accident from which a cause of action would have otherwise accrued."
>
> Kearny v. Boston, 9 Cush. 108.

Again, quoting from the Supreme Court of Minnesota, on the same and following pages, it approves this language:

> "We are of the opinion that the personal representative has no right of personal action where the deceased never had such right, and that where death was simultaneous with injury it is impossible to the healthy mind to conceive of a right of action in the man instantaneously killed."

We do not understand that defendant in error makes any contention adverse to this view, and therefore pass further consideration of this proposition.

We urge that it is a simple rule of evidence that the burden of proof is upon the plaintiff. To prevail in this case, the plaintiff below must show survival by plaintiff's intestate for an appreciable length of time after the accident, and there is no burden upon the defendants below to show

that plaintiff's intestate did not survive for that appreciable length of time. In the absence of proof, it is patent that the plaintiff has failed to prove an essential averment; and his failure is fatal to his contention. There is no evidence introduced in this case that any of the witnesses to the fatal accident had any knowledge of the presence of the plaintiff's intestate within the enclosed milk wagon until after the accident had happened and the train was brought to a stop and investigation made. Chappel, who was the witness closest to the wagon, testified that he heard no outcry of any kind or character at the time of the collision. There was no testimony that Clement, Jr., was seen within the wagon; and what happened to Clement from the time of the collision at the crossing until he was discovered beneath the train is left wholly and entirely to speculation and conjecture.

Passing, temporarily, other considerations, it is the law in this State that there must be more than a mere scintilla of evidence to justify a verdict, or it will not be permitted to stand. This has been the law since the case of

> Pierre v. G. F. & C., 22 Mont. 445; 56 Pac. 868; and cases following that authority.

What evidence was submitted to the jury which will justify them in concluding that Clement received any injury prior to the fatal shock which swept his life away within the twinkling of an eye? There is not, we respectfully urge, a suggestion anywhere in the record that Clement received any injury before the top of his head was removed. We may, by speculation or conjecture, reach an-

other conclusion, but a much more reasonable conclusion, if we are permitted to speculate, would be that the first injury received by David Clement, Jr., was the fatal injury, from the fact that Chappell, who was running beside the engine at the time of the collision and was almost at the very point of the accident, heard no outcry when the collision happened. We can well imagine that if the first blow was not instantaneously fatal, David Clement, Jr., would have screamed in anguish, and that his failure to so scream is probably accounted for by the fact that his first injury was instantly mortal. In view of the fact that from the time of the accident until his discovery under the train by Chappell there is an absolute dearth of testimony or facts from which any fair inference can be drawn, we respectfully urge that there has been a failure of proof of an essential averment or allegation, and that the nonsuit should have been granted.

We think it is clear from all the facts and circumstances in connection with the case that there was not such a survival as the Statute contemplates.

Chief Justice Shaw of Massachusetts, 9 Cush. 108, says:

> "We are to ascertain what the intent of the Legislature was when they passed the law. It is not to be supposed that they intended to make a distinction between a case where the death was so instantaneous that there was no manifestation or life whatever and a case where there might be some slight spasmodic action of the body of the sufferer to indicate that life was not quite extinct."

This is quoted with approval in

Lobenstein v. Iron Works, 146 N. W. 293; 297.

This brings us properly to a consideration of what is meant by "instantaneous death." The case last quoted considered the proposition, and we believe that their reasoning is correct. The court in this case said:

> "We see no reason for splitting hairs as to what is meant by instantaneous death, though we can appreciate the difference between a continuing injury resulting in drowning or death by hanging, throwing from a housetop, etc., and one where a person survives the wrongful act in an injured condition."

And, quoting from West v. Detroit, 123 N. W., 1101, they approve this statement:

> "Where there is a continuing injury resulting in death within a few moments, it is instantaneous, within the meaning of the Statute."

It is the defendants' contention in this cause that the injury which snapped the thread of life for David Clement was a continuing injury, so far as the evidence shows; and in the purview of the law, there was no appreciable time between the collision and Clement's demise.

A kindred case is that entitled "The Corsair," determined by the Supreme Court of the United States and reported in 145 *U. S. at page* 335. We direct the court's attention to page 348, where it is suggested that pain and suffering sustained by the intestate must be separable, as a matter of law, from the accident, and not substantially cotemporaneous with death. It appears clear to us that the Supreme Court in this case was clearly of the view that even a few seconds of conscious suffering would not satisfy the requirements of survival for an appreciable

time. In this connection we call the attention of the Court to the case of

Moyer v. Oshkosh, 139 N. W. 378.

That case, page 380, says where death is instantaneous or practically so, there is no cause of action in favor of the estate as a beneficiary. The case itself was brought under another theory; and we simply cite the case on the proposition that a spasmodic or convulsive twitching of the body after accident wholly fails to satisfy the law.

The case of

Carolina Railway Co. v. Shewalter, 161 S. W. 1136,

is a carefully considered case. We quote from cases cited with approval in that case. They quote

Kearney v. B. & W. Ry. Co., 9 Cush. 108,

with approval in the following language:

> "If the death was instantaneous, and, of course, simultaneous with the injury, no right of action accrues to the person killed, and, of course, none to which the statute can apply. But if the party survives, lives after it, the right of action accrues to him, as a person in esse, and his subsequent death does not defeat it, but, by operation of the statute, vests in it, the personal representative."

And, again, quoting from

St. Louis Ry. Co. v. Dawson, 56 S. W. 46, an Arkansas case,

they approve this statement:

> "The survival of the action depends upon whether

> the injured child lived after the act constituting the cause of action."

In this case, we contend that there was a single accident; that the injury to David Clement, Jr., caused his instantaneous death, and that it is immaterial whether he received some slighter injury a second or two before the injury to his head, or whether he received the latter injury first. This cause is brought on behalf of the estate for injuries suffered by plaintiff's intestate which accrued to him during his lifetime. The case was tried on the theory that the particular injury on which recovery was sought was the injury which produced death. That injury was the injury to the head.

The clearest statement of what is meant by "instantaneous death" that we have been able to discover is found in

> West v. Detroit, a Michigan case, reported in 123 N. W. 1101.

The court in that case said,

> "Where there is a continuing injury resulting in death within a few minutes, it is instantaneous, within the meaning of the Statute."

We wholly fail to see any difference between the case of a drowning person, who cannot be said to survive an appreciable length of time after the fatal accident, and the case of a person under the wheels of a train who in the course of a few seconds from the time of the collision is found dead. Viewed most favorably for the plaintiff, the injury during the few seconds is a continuing one, in the absence of evidence that the blow to the head was not first

and death was not instantaneous; and recovery by the plaintiff cannot be allowed on either theory. The test is, we urge, the question whether there was life after the accident; and we have been unable to find any reported opinion in which a recovery was allowed unless there was evidence of life after the accident. The cases which seem at first glance to oppose this statement, on investigation, prove to be cases in which there was evidence of life after the accident. In this case, there was but one accident. It began with the collision on the crossing. It ended with the death of plaintiff's intestate. It was a continuing accident, resulting in a fatality. After the accident happened, there is absolutely no testimony justifying a conclusion of survival at all. There is not a scintilla of evidence that the injury which crushed off the top of the head was not the first injury received by Clement, Jr.; and it is a fair inference, from the fact that the boy never screamed or made an outcry, that such was indeed the case.

We do not find a great number of reported decisions on the precise point at issue. The CORSAIR case, *supra*, is the only instance, so far as we have found, in which the Supreme Court of the United States touched the matter. The difficulty of the situation here lies in the question, What facts justify an inference of survival?

Michigan has two statutes; one, a survival statute, and the other, a death statute. The question has been before that court as frequently as before any.

Ely v. Detroit United Ry. Co., 127 N. W. 259,

was a case brought on two counts, one under each Act.

The court held there that the evidence that a plaintiff survived the original injury from ten minutes to half an hour was sufficient to bring it under the "Survival Act".

The case of

West v. Detroit United Ry. Co., 123 N. W., at 1102,

is a case brought to recover damages for a drowning. The in death within a few minutes it is instantaneous, within the meaning of the Statute. We do not contend that the case passed on that point; but the construction by the court of what is meant by instantaneous death is unequivocal.

Te case of

Cheatham v. Red River Line, 56 Fed. 248,

is a case brought to recover damages for a drawning. The Federal Court for the Eastern District of Louisiana held, on the authority of *The Corsair*, *supra*, that the man's sufferings after he fell into the water and before he drowned cannot be taken into account, since they are substantially cotemporaneous with his death.

Perkins v. Oxford Paper Co., 71 Atl. 476,

was a case in which plaintiff's intestate survived for seventy-five hours, and is not exactly in point, but is a well-reasoned case; and the reasoning supports the contention of plaintiffs in error on the proposition that there must be evidence of a survival.

Tiffany's Death by Wrongful Act, 2nd Ed., (paragraphs 74, 75, and 76),

classifies and discusses the holdings of courts of different jurisdictions; and

Corpus Juris, Vol. I., at page 197,

contains a statement and a note on the proposition.

These two texts cite substantial authorities, upon which plaintiffs in error rest their contention.

The law is well settled in Massachusetts.

Kearney, Admx., v. Boston & Worcester, 63 Mass. 108,

was a case brought on account of wrongful death. The court, stating that the death was instantaneous, ruled that the action could not be maintained; and in that case a girl, who was less than two rods from the place of the accident, saw the deceased girl suffer her injury, and saw her move her hands and feet slightly after the accident, but she only breathed once after the arrival of the witness and gave no signs of consciousness.

The facts in the case at bar are much stronger, from the standpoint of the plaintiffs in error, in view of the fact that the only evidence of any survival at all was rejected by the trial judge in considering the motion for a new trial.

Moran, Admx., v. Hollings, 125 Mass. 93,

was a case in which damages were sought for the death of a sixteen-year-old boy who was killed while in the employ of the defendants. He fell forty feet through four hatchways, and was killed by striking the lower floor of the defendants' building. The court directed a verdict for the defendants, despite plaintiff's contention that the dead

boy, in falling through the hatchways, might have struck against some obstacle, and thereby received injuries for which he might have a cause of action before he was killed.

Maher v. Boston & O. R. Co., 32 N. E. 950,

was a case brought to recover damages for the death of a brakeman who was knocked off the rear car of a train by contact of his head with a bridge; and, in this case, the court held that the evidence justified the inference that death was instantaneous, the lesions on the head being sufficient to produce instant death. They infer that the fact that there was no outcry after plaintiff's intestate fell was a fair indication that death was instantaneous. We have heretofore suggested in this brief that the fact that Clement, Jr., was never heard to make an outcry throughout the entire affair justifies the inference, on the authority of this case, that his first injury snapped the thin-spun thread of life. Even Chappell, whose testimony was, in the language of the Court, nicely calculated to meet the requirements of some authorities, would not say that he heard the slightest noise; and neither did Willoughby testify to any such noise, and probably he could have heard a scream had one been uttered.

Mulchey (Mulchahey) v. Washburn Car Wheel Co., 14 N. E. 106,

held that a terribly crushed condition of the body, viewed in the most favorable light for plaintiff, failed to justify a conclusion of any conscious pain or suffering on the part of the intestate after he received his injuries. The mat-

ter being left to conjecture, plaintiff failed in that case for want of proof.

The case of

Carolina C. & O. Co. v. Shewalter, 161 S. W. 1136,

is a Tennessee case, which considers at great length and with great clearness of expression the proposition of survival after accident. They reach the conclusion of law, which is settled beyond the peradventure of a doubt in Montana, that no right of action passes to the administrator when the killing was instantaneous.

The clearest expression of the law in Montana is to be found in the case of

Dillon v. Great Northern Ry. Co., 100 Pac. 960.

They approve the language of the Supreme Court of Mississippi in the case of

Illinois Central Ry. Co. v. Pendergrass, 69 Miss. 425; 12 So. 954,

in which it was said that where death was simultaneous with injury, it is impossible, with a healthy mind, to even conceive of the right of action in the man instantaneously killed. The court cites, with approval, the Kentucky case,

Hansford v. Payne, 11 Bush. 380,

and

Belding v. Black Hills, etc., Co., 3 S. D. 369; 53 N. W. 750,

which court came to the same conclusion in considering survival statutes.

The Dillon case was ordered dismissed by the Supreme

Court because it appeared, without controversy, that the plaintiff's intestate was instantaneously killed.

In this case, plaintiff stands, so far as the record before your Honors is concerned, in this condition: the only evidence of any survival at all was wholly rejected in a scathing arraignment by the trial judge of the witness who gave it. Possibly it may be contended that the trial judge erred in rejecting the testimony of Chappell, and that it should properly have been considered by him; but, in that case, defendant in error is impaled upon the other horn of the dilemma, because, the evidence being rejected, there was absolutely no testimony of a survival; and a new trial should have been granted. Defendant in error is compelled, then, to rely upon inferences of fact that may be drawn from the grewsome occurrence itself. No reasonable inference can be drawn adverse to the contention of plaintiffs in error that death was instantaneous. David Clement, Jr., was probably asleep in his milk wagon; and, in all human probability, never had a conscious instant of awakening from that sleep from the time of the collision until his death.

Respectfully submitted,

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Service of the above and foregoing Brief is hereby acknowledged, and copy thereof received, this 24th day of April, A. D. 1915.

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